No. 12232

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN E. WALLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 12232

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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SUBJECT INDEX

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ARGUMENT OF THE CASE

I. REPLY TO APPELLEE'S ARGUMENT THAT THE COMMODITY CREDIT CORPORATION OWNED THE PROPERTY AT THE TIME IT WAS TAKEN.

Appellant's contentions are set forth in his opening brief. Appellant does not dispute the *original* ownership by the Commodity Credit Corporation of the potatoes which are the subject of this action. But by its contract with the purchaser, Williamson, and the acts which followed before the potatoes were taken by the appellant, the Commodity Credit Corporation was not the owner of the property at the time that it was taken. The Corporation had lost possession and the right to possession of the potatoes and had delivered the potatoes and the right to possession of them to Williamson, who was entitled to them. It had received full payment under its contract and reserved no right of repossession, rescission or forfeiture of the contract and return of the property in the event of the breach of any covenant in the agreement.

The Commodity Credit Corporation covenanted with the purchaser Williamson for a complete disappearance of the potatoes and for a civil penalty, and it was not deprived by the appellant of the attributes which are associated with ownership. He did not deprive the Commodity Credit Corporation of the possession, value, or use of the potatoes, since the Corporation neither had nor

was entitled to any of those rights at the time the appellant took the potatoes.

The contention of the appellant is that since the Commodity Credit Corporation had sold the potatoes to Williamson, and had vested him with all of the attributes of ownership except possibly the bare legal title, the Corporation did not *own* the property at the time it was taken, as the word "own" was used in the statute under which this indictment was brought.

The appellant does *not* contend, as appellee urges, that the Commodity Credit Corporation was "powerless and impotent" to reserve the title to potatoes which it sold for livestock feed, nor that any reservation of title provision is "illegal," as contended by appellee. On the contrary, the appellant urges that the *ownership* of the goods in question had not been reserved or retained by the Commodity Credit Corporation, and that it was not the *owner* of the potatoes at the time they were taken.

No part of the statute referring to the activities of the Commodity Credit Corporation refers to the sale by that agency of property for livestock feed. Nowhere in that statute is a reference made to the power of the Commodity Credit Corporation to sell property and vest the purchaser with all attributes of ownership except the bare legal title, nor is there any reference whatsoever to indicate that the Congress had in mind such a transaction

as the one which occurred here, at the time the statute was passed. The provision under which the appellant was indicted is headed "Larceny and Conversion of Property." It uses the conventional language of criminal statutes in prescribing the theft of property "owned" by the Commodity Credit Corporation. As a penal statute it should be strictly construed against the Government.

Undeniably, the Congress could have provided specifically, with regard to any such taking as occurred in this case, that it would be a crime to steal from such a purchaser as was Williamson. No such provision is contained in the statute, and its omission is significant.

The purpose of the Government agricultural surplus program was to dispose of surplus commodities which it had bought at a supported price. Whether it thereafter gave away or sold the potatoes, it was no longer the owner of them after the consummation of such a disposal transaction as occurred in this case.

Had the appellant taken the potatoes in question *before* they were sold, obviously the statute would have been applicable. That situation is the one intended to be covered by the statute, and the penal provision should not be warped into a construction unjustified either by its plain wording or by the authorities.

The cases cited by the appellee are clearly distinguish-

able from the situation in this case. The case of *Borman vs. United States,* 2 Cir., 262 F. 26, is one in which the Court found a bailment of Government property which the defendant had conspired to steal. Clearly, in that case the ownership of the property remained in the United States, and the identical property in question was to be returned, in manufactured form, to the Government for use by the Army, after its processing was completed.

United States vs. Haugen, D. C. Wash., 58 F. Supp. 438 and *Haugen vs. United States,* 9 Cir., 153 F. 2d 850 was a case in which the defendant was charged with defrauding the Government by issuing counterfeit meal tickets. The tickets purported to be meal tickets of a Commissary Company which was an agency of the Government. The only relevant issue at the trial and on the appeal was whether the Commissary Company was shown to be a Government agency, and the evidence on that question was held to be sufficient. The statement quoted by appellee from the opinion of the District Judge was clearly dictum.

The appellee relies heavily upon the cases involving the Office of Price Administration ration coupons. Those cases are not controlling. In the applicable regulations not only was the "property" stated to remain forever in the Office of Price Administration, but provision was also clearly made for the recalling of any ration coupon, and for the requiring of the surrender and return of any such

coupon and its revocation or cancellation. In the case of those regulations, there was no mere retention of bare legal title, such as has been held in the many cases cited by the appellant not to constitute *ownership*.

The appellee has made no effort to refer to the cases cited by the appellant in his opening brief, except to state that they do not "touch upon facts similar to this." The appellant urges that the opinions of some seventy courts, with regard to the meaning of the words "owned," and "ownership," may not be so lightly cast aside in a case in which the interpretation of those words is directly in issue. This Court should hold, as have those many decisions, that the reservation of the bare legal title does not reserve in the transferor the ownership of the thing in question.

II. REPLY TO APPELLEE'S ARGUMENT THAT THE APPELLANT INTENDED TO STEAL THE POTATOES IN QUESTION.

The appellant's motions for judgment of acquittal should have been granted because there was lacking substantial evidence that the appellant intended to steal the property which he took, or to commit any other offense with regard to it. He had every reason to believe that the potatoes he was handling were owned by his close friend and neighbor, Williamson, and that he had at least implied, if not the expressed consent of Williamson to do with them as he wished.

Williamson *gave* to the appellant an *entire truckload of potatoes* on the same day as that alleged in the indictment. The appellant knew nothing of the Commodity Credit Corporation, nor of any claims by it that it "owned" potatoes which it had sold and delivered to purchasers. It is entirely clear that the appellant entertained no criminal intent in the diverting of property which he thought was Williamson's.

Against this positive state of the record, the appellee sets such conclusions as the appellant "must have known that they were potatoes purchased under the Commodity Credit Corporation Act" and that "almost everyone knew of the 1948 potato price support program."

The criminal intent which must be found before a felony conviction can be sustained, should not be rested upon such vague conclusions, when set against positive evidence to the contrary. The evidence is uncontroverted that neither the appellant nor his trucking firm had any previous knowledge or experience with Commodity Credit Corporation or any product sold by it, or had ever previously handled any "surplus" potatoes.

The evidence in this case is just as consistent with the innocence of the appellant as it is with his guilt, and the appellant's motions for judgment of acquittal should have been granted.

III. REPLY TO APPELLEE'S ARGUMENT THAT PLAINTIFF'S EXHIBIT NO. 12 WAS PROPERLY ADMITTED IN EVIDENCE.

The appellant urges that his motion for a new trial should have been granted because the District Court erred, to appellant's projudice, in admitting evidence that two days *after* the date of the alleged offense, the appellant entered into a contract with the Commodity Credit Corporation for the purchase of potatoes for livestock feed.

It is clear that the appellant did not actually execute any contract with the Commodity Credit Corporation, but that a contract was executed by one of appellant's brothers for him on August 25, 1948. At all times at the trial, the appellee contended that the appellant formed an intent to steal the potatoes in question on August 23, 1948, and the contract in question was entirely irrelevant to the issues made by the indictment and appellant's plea.

After the potatoes in question were diverted, they were sold to a dealer in Portland, Oregon, two days thereafter. Appellee would have the Court believe that the evidence as to the contract entered into by appellant, through his brother, with the Commodity Credit Corporation, had some connection with the sale of potatoes in Portland two hundred miles away. But the Government did not contend that appellant's intent was deduced from the sale of the potatoes in Portland; it urged at the trial that the intent

was derived from the appellant's actions on Monday, August 23, in Sunnyside, Washington, and at the Williamson farm on that date.

The situation is thus clear that the District Court admitted in evidence a document which was completely irrelevant because it was in no way connected with the offense charged. Neither in point of time nor otherwise did it reveal anything with regard to the intent of the appellant, and the admission of this improper evidence was highly prejudicial to the appellant.

The appellee has cited no authority for its apparent position that offenses occurring *subsequent* to those charged were properly admitted in evidence. The cases cited by it, *Henderson vs. United States,* 9 Cir., 143 F. 2d 681, and *Tedesco vs. United States,* 9 Cir., 118 F. 2d 737, relate to factual situations and circumstances occurring prior to that upon which the criminal charge was based. On the other hand, the case of *Witters vs. United States* (Ct. App. D. C.) 106 F. 2d 837, 125 A.L.R. 1031, is a clear and distinct holding that the admission of such evidence as was objected to by the appellant constitutes reversible error.

The commission of that error necessitates the granting of a new trial.

In conclusion, it is respectfully urged that the judgment

of conviction and sentence which was entered by the District Court be reversed.

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